Luckypick Enterprise Sdn Bhd v Public Prosecutor (Council of The City of Kuching South) (MBKS)

HIGH COURT (KUCHING) — NO KCH-44–2/3 OF 2012
RAVINTHRAN JC
8 MAY 2012

Criminal Procedure — Jurisdiction of court — Magistrate's court, powers of — Summons issued by magistrate — Application to quash summons — Whether magistrate lacked sufficient grounds to issue summons — Criminal Procedure Code s 136 — Local Authorities Ordinance 1996 ss 153 & 161B

At all material times the applicant had operated a numbers forecast totalisator telelink outlet without a licence. By-law 2 of the Kuching Municipal Council ('the by-law') required a licence for the sale of any licensed lottery. The enforcement team from the Council of the City of Kuching had issued a notice under s 161B of the Local Authorities Ordinance 1996 ('the Ordinance') to seal off the applicant's premises for the sale of lottery without licence. Despite the s 161B notice, the applicant had continued to operate the unlicensed lottery activity. The deputy public prosecutor ('DPP') applied to the magistrate for a summons against the applicant. The applicant was charged with committing an offence under s 153 of the Ordinance, namely conducting the sale of licensed lottery without a licence after it had been prohibited from carrying on such an unlicensed activity from its premises. This was the applicant's application to quash the criminal summons issued against it on the grounds that the prosecution had no sufficient grounds for proceeding against it. The applicant contended that it was not running a lottery business. According to the applicant the numbers forecast totalisator business involved the placing of bets on the outcome of a horse race and was not covered by the meaning of licensed lottery under the by-law.

Held, dismissing the application:

(1) It is settled law that under s 136 of the Criminal Procedure Code, the magistrate only needed to be prima facie satisfied that there was sufficient grounds for proceeding against the applicant. On the face of the written complaint by the DPP, it could not be said that the magistrate lacked sufficient grounds to issue the summons. It was stated in the written complaint to the magistrate that the applicant continued to operate the sale of lottery on the premises and had therefore contravened s 153 of the Ordinance. Whether the applicant had actually used the premises for sale of a licensed lottery without a licence under the by-law was a matter to be determined in the trial (see paras 10–11).

(2) This court had fully considered the decision in the Indian Supreme Court case of *Smt Nagawwa v Veeranna Shivalinggapa* AIR 1976 SC 1947; 1976 SCR 123, which was cited by the applicant in support of its case, before concluding that the magistrate had properly exercised his discretion to issue a summons against the applicant in this case. The allegations of the DPP in the written complaint, if taken at face value, disclosed an offence. The allegations were not inherently improbable. As the written complaint was not filed by a private citizen but by a public officer acting in his official capacity, there was no reason to conclude that the magistrate exercised his discretion capriciously. Finally the written complaint and the issuance of the summons did not suffer from procedural infirmity (see para 12).

(3) This court also declined to exercise its revisionary power to quash the summons (see para 14).

[Bahasa Malaysia summary

Pada kesemua masa material pemohon menjalankan kedai telelink totalisator nombor ramalan tanpa lesen. Undang-undang kecil 2 Majlis Perbandaran Kuching ('undang-undang kecil') memerlukan lesen untuk jualan apa-apa loteri berlesen. Pasukan penguatkuasa daripada Majlis Bandar Kuching telah mengeluarkan notis di bawah s 161B Ordinan Pihak Berkuasa Tempatan 1996 ('Ordinan') untuk menutup premis pemohon untuk jualan loteri tanpa lesen. Meskipun diserahkan dengan notis s 161B, pemohon terus menjalankan aktiviti loteri tidak berlesen. Timbalan pendakwa raya ('TPR') memohon kepada majistret untuk saman terhadap pemohon. Pemohon didakwa melakukan kesalahan di bawah s 153 Ordinan, iaitu menjalankan jualan loteri berlesen tanpa lesen selepas dilarang daripada menjalankan aktiviti tidak berlesen sebegitu daripada premisnya. Ini adalah permohonan pemohon untuk membatalkan saman jenayah yang dikeluarkan terhadapnya atas alasan bahawa pihak pendakwaan tidak mempunyai alasan yang mencukupi untuk prosiding terhadapnya. Pemohon berhujah bahawa ia bukan menjalankan perniagaan loteri. Mengikut pemohon perniagaan totalisator nombor ramalan melibatkan pertaruhan pada keputusan perlumbaan kuda dan tidak dilindungi oleh maksud loteri berlesen di bawah undang-undang kecil.

Diputuskan, menolak rayuan:

(1) Adalah undang-undang nyata bahawa di bawah s 136 Kanun Acara Jenayah, majistret hanya perlu menjadi berpuas hati prima facie bahawa terdapat alasan mencukupi untuk prosiding terhadap perayu. Atas fakta aduan bertulis TPR, ia tidak dapat dikatakan bahawa majistret tidak mempunyai alasan yang mencukupi untuk mengeluarkan saman. Ia dinyatakan di dalam aduan bertulis kepada majistret bahawa pemohon terus menjalankan jualan loteri di premis dan oleh itu melanggar s 153 Ordinan. Sama ada pemohon sebenarnya menggunakan premis untuk

jualan loteri berlesen tanpa lesen di bawah undang-undang kecil adalah perkara yang perlu ditentukan di dalam perbicaraan (lihat perenggan 10–11).

(2) Mahkamah ini mempertimbangkan dengan sepenuhnya keputusan kes Mahkamah Agung India *Smt Nagawwa v Veeranna Shivalinggapa* AIR 1976 SC 1947; 1976 SCR 123, yang dirujuk oleh pemohon dalam menyokong kesnya, sebelum memutuskan bahawa majistret telah menjalankan budi bicaranya dengan betul untuk mengeluarkan saman terhadap pemohon dalam kes ini. Dakwaan-dakwaan TPR dalam aduan bertulis, jika diambil pada nilai muka, mengemukakan kesalahan. Dakwaan-dakwaan tersebut bukan sukar diterima akal. Memandangkan aduan bertulis tersebut tidak difailkan oleh orang perseorangan tetapi oleh pegawai awam bertindak dalam kapasiti rasminya, tidak ada alasan untuk memutuskan bahawa majistret menjalankan budi bicaranya secara tidak menentu. Akhirnya, aduan bertulis tersebut dan pengeluaran saman tidak mengalami kelemahan prosedur (lihat perenggan 12).

(3) Mahkamah ini juga menolak daripada menjalankan kuasa semakannya untuk membatalkan saman tersebut (lihat perenggan 14).]

Notes

For cases on magistrate's court, see 5(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2465–2510.

Cases referred to

Smt Nagawwa v Veeranna Shivalinggapa Konjalgi AIR 1976 SC 1947; 1976 SCR 123, SC (refd)

Legislation referred to

Code of Criminal Procedure [IND] s 204
Criminal Procedure Code s 136
Local Authorities Ordinance 1996 ss 153, 161B

Wong Sing Nang (Wong, Orlando Chua & Kuok Advocates) for the plaintiff.
Poh Yih Tin (Musli with her) (Deputy Public Prosecutor, Attorney General's Chambers, Sarawak) for the defendant.

Ravinthran JC:

[1] This is a criminal application vide notice of motion dated 20 March 2012 by Luckypick Enterprise Sdn Bhd to quash a criminal summons issued against it under s 136 of the Criminal Procedure Code.

BRIEF FACTS

[2] The applicant company was operating a business selling number forecast

totalisator via telelink (also known as *Da Ma Cai*) on its premises. The prosecution preferred the following charge pursuant to a summons issued by the magistrate:

> That you, on 25th October 2011 at or about 1025 hours allowed the premises at 550, no. 187, Taman Hui Sing, 93350 Kuching, Sarawak to be used for a business activity viz. the conduct or sale of licensed lottery, notwithstanding a Notice issued under section 16IB of the Local Authorities Ordinance, 1996 (Sarawak Cap. 20) by the Council of the City of Kuching South having been given to you on 31st March 2010 sealing off the said premises and you have thereby committed an offence under section 153 of the Local Authorities Ordinance, 1996 (Sarawak Cap. 20) and punishable under section 150 of the said Ordinace.

[3] The summons was applied for by the learned deputy public prosecutor ('DPP').

[4] The charge against the applicant was that they contravened s 153 of the Local Authorities Ordinance 1996 (Sarawak Cap 20) which enacts as follows:

> 153 When any matter or thing is by this Ordinance, or by any order or notice made and published under authority thereof, directed or prohibited to be done, or where any authority is given by this Ordinance to any person to direct or prohibit any matter or thing to be done, and such act so directed to be done remains undone or such act so prohibited to be done is done, then, in every such case, every person offending against such direction or prohibition shall be deemed to be guilty of an offence.

[5] In the written complaint to the magistrate for the purpose of application of the summons, it is stated that the enforcement team from the Council of the City of Kuching South issued a notice under s 161B of the said Ordinance to seal off the premises of the applicant because the premises had been used for the sale of licensed lottery without licence under the relevant by-law. Subsequent to the issuance of the said notice, the enforcement team discovered (according to the written complaint) that the applicant continued to use the premises for the sale of lottery without a licence under by-law 2 of the Kuching Municipal Council (licensing of miscellaneous occupations). By-law 2 requires a licence for the sale of any licenced lottery. It reads as follows:

> 2 All Licensing of Miscellaneous Occupations by-laws specified in the Schedule shall be amended by adding the following new item in the First and Second Columns of the First Schedule —
>
> Agency for the conduct or sale of any licensed lottery
>
> RM 1,000.00 per year payable on or before the first working day of each year.

[6] As the applicant did not possess a licence under the above by-law and

allegedly continued to operate the number forecast totalisator telelink outlet (according to the written complaint) despite the s 161B notice to seal the premises, they were charged under s 153 of the Local Authorities Ordinance 1996 (Sarawak Cap 20).

GROUNDS OF APPLICATION

[7] Learned counsel for applicant has applied to quash the said summons on the following grounds:

(a) there was suppression of material facts in the public prosecutor's complaint; and

(b) there is no sufficient ground for proceeding.

[8] The fundamental reason that the applicant has moved this court to quash the summons is their contention that they were not running a lottery business. Counsel for applicant has addressed a lengthy argument why the business of the applicant does not fall within the ambit of 'lottery' under the relevant by-law. He has argued that the numbers forecast totalisator business involves placing of bets on the outcome of a horse race and is not covered by the meaning of licensed lottery in the by-law. I am of the opinion that this is eminently a matter for the magistrates' court to decide if the trial proceeds. in the first place it is not even the duty of the magistrate to enter into a detailed discussion of the law and facts before issuing the summons.

[9] In respect of the non-disclosure of material facts, counsel for applicant submitted that the DPP failed to disclose to the magistrate, when applying for the summons, that by virtue of a consent order in a related civil suit, the items seized from the applican's premises were returned. I do not see why such disclosure is relevant for the purpose of issuance of a criminal summons. Mere release of seized items vide a consent order in a civil suit does not necessarily absolve the applicant of criminal wrongdoing, if any.

[10] To recapitulate, I find nothing wrong in the issuance of the summons based on the application of the DPP. Under s 136 of the Criminal Procedure Code, the magistrate only need to be prima facie satisfied that there is *sufficient ground* for proceeding. In describing the duty of the magistrate at the cognisance stage, the Supreme Court of India in *Smt Nagawwa v Veeranna Shivalinggapa Konjalgi* AIR 1976 SC 1947; 1976 SCR 123 (cited by both DPP and counsel for the applicant) said as follows:

> It is well settled by a long catena of decisions of this court that at the stage of issuing process the magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be prima facie satisfied whether there are sufficient grounds for proceedings against the accused. It

is not the province of the magistrate to enter into a detailed discussion of the merits or de-merits of the case nor can the High Court go into this matter in its revisional jurisdiction which is a very limited one.

[11] It must also be noted that the magistrate is not obliged to examine the complainant upon oath before issuing the summons if the complainant is a public servant acting in an official capacity. On the face of written complaint by the DPP, it cannot be said that the magistrate lacked *sufficient ground* to issue the summons. A notice to seal the premises had been issued under s 161B. It is stated in the written complaint to the magistrate that the applicant continued to operate the sale of lottery on the premises and had therefore contravened s 153. Whether, the applicant had actually used the premises for sale of a licensed lottery without a licence under the relevant by-law is a matter to be determined in the trial. Before I conclude, I must state that I have not omitted to consider the following passage from the same Indian Supreme Court case of *Smt Nagawwa v Veeranna Shivalinggapa Konjalgi* which was cited by counsel for applicant:

> Thus it may be safely held that in the following cases an order of the magistrate issuing process against the accused can be quashed or set aside:
>
> (1) where the allegations made in the complaint or the statement of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;
>
> (2) where the allegations made in the complaint are potently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;
>
> (3) where the discretion exercised by the magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and
>
> (4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like.

[12] In above mentioned case, the Supreme Court of India considered the power of the magistrate to issue process under s 204 of the Code of Indian Criminal Procedure which is similar to s 136 of our Criminal Procedure Code. However, it must be noted that none of the four circumstances in paras (1)–(4) apply to the instant case. The allegations of the DPP in the written complaint, if taken at face value, disclose an offence. The allegations are not inherently improbable. There is no reason to conclude that the magistrate exercised his discretion capriciously. The written complaint was not filed by a private citizen

but by a public officer acting in his official capacity. Finally, the written complaint and the issuance of summons do not suffer from any procedural infirmity. In fact, the above mentioned case supports the argument of the prosecution that interference at this stage is not appropriate as the Supreme Court said as follows:

> Once the magistrate has exercised his discretion it is not for the High Court, or even this court, to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused.

[13] Counsel for applicant also submitted that the state attorney general's chambers had earlier admitted that there was insufficient evidence to prosecute. This is because some unknown person had allegedly made available to the applicant a letter from the state attorney general's chambers to the enforcement team of the local authorities. The letter instructed enforcement officers to seek advice from the state attorney general's chambers on the preparation of investigation papers. However, the said letter, even if it is genuine, only makes a general reference to various cases where various NFT telelink outlets were operating without a licence and does not make a specific reference to the instant case. It goes without saying that whether there are sufficient grounds or not to issue a summons must be decided on a case by case basis.

[14] For all the reasons given above, I shall dismiss the application by way of notice of motion to quash the summons issued against the applicant. For the same reasons, I shall also decline to exercise my revisionary power to quash the said summons.

Application dismissed.

Reported by Kohila Nesan